No. 79-2026

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

PAGE

Appellants' Brief In Opposition To Motion To Dismiss:

I 1

II 3

III 6

CONCLUSION 7

PAGE

TABLE OF AUTHORITIES

Cases Cited

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 1-3, 6, 7

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 5

Other Authority Cited

Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978) 6

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

Review of this case by this Court is proper at this time. The State of New Jersey agrees: it affirmatively asserts in its motion that the record is complete, that discovery has been had, that further proceedings are unnecessary to decide the case, and that a speedy disposition is warranted.

Most important, New Jersey does not dispute *any* of the basic factual assertions on which rests appellants' claim that the New Jersey Commuter Tax is indistinguishable from the tax struck down in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). Thus, New Jersey does not dispute that:

—The Commuter Income Tax has been applied and will be applied only to New Yorkers.

—The Commuter Income Tax was not designed to impose a tax on New Yorkers at all.

—The vast majority of interstate commuters are New Jersey citizens, not New Yorkers.

—The proceeds from the tax paid by New Yorkers are used principally to finance intrastate transportation facilities used mainly by New Jersey residents.

—The rate, and other aspects, of the Commuter Income Tax have not been adjusted—even once—during the entire twenty year history of the tax to meet any changing transportation needs or burdens, but solely to conform to the New York State Income Tax.

In short, on the *undisputed* facts, the Commuter Income Tax, like the discriminatory tax struck down in *Austin,*

"falls exclusively on the income of nonresidents and is not offset, even approximately, by other taxes imposed upon residents alone." *Austin* v. *New Hampshire,* 420 U.S. at 665.

New Jersey tries to distinguish the tax here from the tax in *Austin* by urging—as it urged below—that New Yorkers commuting to New Jersey place a burden on New Jersey transportation services, a burden that allegedly justifies the special tax on New Yorkers only. But this distinction is simply untenable on the undisputed facts listed above. New Jersey's attempted justification for its tax on New Yorkers defies even common sense: since New Yorkers constitute a minority of interstate commuters, they are traveling against the flow of rush hour traffic—a flow created by New Jersey citizens—and therefore New Yorkers cannot impose a significant commutation burden. More important, New Jersey's profferred distinction is irrelevant, since the burden imposed by New Yorkers here is no different from the burden imposed by the residents of Maine who necessarily "transported" themselves to New Hampshire.*

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* Although all the key facts on which we rely are undisputed, in the few instances where New Jersey purports to engage in a discussion of facts, it does so without a single record reference—with good reason: its "facts" are both wrong and irrelevant. Thus:

New Jersey describes itself as a "corridor state" with only a limited number of available "river crossings" (Appellee's Brief, at 2). According to the State, the restricted number of river crossings cause interstate transportation problems which justify the Commuter Income Tax. These river crossings, however, are under the jurisdiction of—*and paid for by*— the New York Port Authority, not the State of New Jersey. (Deposition of Russel H. Mullen dated January 17, 1978, at 15-18).

(Footnote continued on following page)

II

New Jersey says that review may not be had, despite the readiness of both parties to stand on the record, because the Supreme Court of New Jersey ordered further proceedings. New Jersey's effort to hide behind the remand order, by characterizing the "Question Presented" in this case as whether "a remand order presents a substantial federal question," only highlights the need for review by this Court, and at this time. The remand order disregards this Court's decree in *Austin* by forcing appellants, who have already spent years in the state court system, to litigate again the same legal question answered by this Court after much turmoil just a few years ago.

(Footnote continued from preceding page)

New Jersey says next that its tax structure relies heavily on real property taxes "ordinarily paid only by residents," and therefore New Jersey must place a commutation tax on New Yorkers (Appellee's Brief, at 2). New Jersey itself concedes, however, that its real property taxes are levied against residents and nonresidents alike, and there is no support in the record for the notion that New Yorkers pay an insignificant share of New Jersey property taxes. To the contrary, appellee admitted during discovery that he had no idea what proportion of New Jersey property taxes are paid by New Yorkers owning property located in New Jersey (Deposition of Sidney Glaser dated January 12, 1978, at 137-38). This Court expressly held in *Austin* that taxes imposed on both residents and nonresidents alike are irrelevant to the inquiry here. 420 U.S. at 659 n.3.

New Jersey says finally that the tax was the subject of an "executive accord" between the Governors of New York and New Jersey which accepted the tax as legal (Appellee's Brief, at 5-7). The legal irrelevance and factual baselessness of this alleged "accord" is addressed by appellants in their response to the cross petition for certiorari filed by appellee.

Moreover, the limited remand ordered by the New Jersey Supreme Court to determine "the benefits and burdens to nonresidential commuters occasioned by State transportation programs and imposition of the ETT" (App. A, at 26) is, in light of New Jersey's own concessions in its Motion to Dismiss, meaningless.*

Since New Jersey does not dispute that New Jerseyites commuting to New York far outnumber New Yorkers commuting to New Jersey, a remand to determine whether New Yorkers constitute the "peculiar source" of New Jersey's alleged transportation difficulty is a waste of time. And since New Jersey concedes that the tax never even purported to be based on any analysis of any transportation burden created by New Yorkers, and, indeed, as originally enacted, did not fall on New Yorkers at all, a remand to determine whether the discrimination practiced against New Yorkers bears a "substantial relationship" to the burdens allegedly imposed by New Yorkers on transportation, is meaningless.

New Jersey argues that a remand order which it agrees is unnecessary and which accomplishes only delay in vindication of constitutional rights is, nonetheless, a bar to this Court's review. This is wrong as a matter of law. As we noted in our main brief, this Court repeatedly has given substantive content to the term "final judgment"; it has not refused to review a case merely because the judgment appears in form only to be "inter-

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* New Jersey asserts that the remand by the New Jersey Supreme Court was for a "plenary" trial (Appellee's Brief, at 10-11). It was not. The remand is limited to two issues only—whether New Yorkers constitute the "peculiar source" of New Jersey's transportion burden and, if so, whether the tax bears a substantial relation to that burden.

locutory." Thus in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), this Court said review is proper, despite an outstanding remand order, where—as here—the state court erroneously refuses to strike down a statute, and therefore the trial should not take place at all. 420 U.S. at 485. Similarly, this Court said in *Cox* that a judgment is "final" if the dispositive federal issue will survive and require decision by this Court regardless of the outcome of future state court proceedings. 420 U.S. at 480. Since appellants will return to this Court with precisely the same claim presented here if they do not prevail on remand, and it is obvious from New Jersey's brief that it, too, will seek review in this Court on the precise ground presented in its motion to dismiss and its cross petition for certiorari if it does not prevail on remand, nothing "short of settlement of the case" will make unnecessary a decision by this Court.

New Jersey's assertion that the policies of the finality rule will be impeded if review is granted because it would delay the proceedings on remand (Brief for Appellee, at 14) can be answered by a single sentence from New Jersey's own brief:

> "[I]t was the position of the appellee before the Supreme Court of New Jersey and continues to be his position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT." (Brief for Appellee, at 11.)

A resolution by this Court whether the tax is constitutional or not—as both parties agree may be done on the present record—will not delay state court proceedings, it will obviate them. Chief among the policies of the finality rule is the avoidance of "the mischiefs of

economic waste" and of "delayed justice." Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004, 1006 (1978). Those policies can be served only if review is granted now.

III

New Jersey's assertion that the decision below upholding the tax under the Equal Protection Clause does not warrant review because claims by nonresidents of discriminatory taxation generally have been grounded upon the Privileges and Immunities Clause (Brief for Appellee, at 19) is mystifying. The statement is untrue since, for example, plaintiffs in *Austin* grounded their claim also on the Equal Protection Clause. Even if it were true, the novelty of a constitutional challenge would be a reason for granting, not denying, review.

New Jersey also contends that the decision below does not warrant review because it is correct. Perhaps the best proof that there is no rational basis for the imposition of the tax lies in this fact: Under the Commuter Income Tax system, citizens of other states commuting to New Jersey and New Jersey citizens who constitute the bulk of interstate commuters are not taxed, while New Yorkers who derive income from New Jersey but do not set foot in New Jersey are taxed.

CONCLUSION

The decision appealed from should be reversed with instructions to declare the New Jersey Commuter Income Tax unconstitutional in light of *Austin* v. *New Hampshire*.

Respectfully submitted,

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